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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957
No. 284

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. MUNA, deceased, *et al.*,

Petitioner,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOE CRIDER, JR.,
548 South Spring Street,
Los Angeles 13, California,
Attorney for Respondent Transocean Air Lines, Inc., a Corporation.

Associate Counsel Not Members of This Court:
ELBER TILSON,
548 South Spring Street,
Los Angeles 13, California,
HENRY E. KAPPLER.
215 West Seventh Street,
Los Angeles 14, California,

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

The Questions Presented by Petitioner Have Been Fully and Completely Disposed of by the Court of Appeals in Conformity With the Decisions of This Court, Particularly the Case of Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416; 57 L. Ed. 815.

Each and every one of the so-called questions presented is grounded upon a false and illusory premise, to wit that the trial court did not give to the petitioner the benefit of the doctrine of *res ipsa loquitur*. Although the trial court at the inception of the trial suggested that the doctrine *res ispa loquitur* did not apply to the case, the

transcript demonstrates, as the Court of Appeals has indicated in its opinion, that the matter was left *open* by the trial court for future comment and discussion and the record reveals without question that the applicability of the doctrine was fully presented and argued by petitioner's counsel in his final argument to the court, and that authorities were given on the subject by counsel to the court prior to the rendition of its decision. The Court of Appeals, in conformity with the decisions of this Honorable Court, held that the evidence, including any inference or presumption created by the doctrine of *res ipsa loquitur*, presented a question of fact for the trial court, and when the evidence was all in, the question for the trier of fact was whether the preponderance was with the plaintiff.

Sweeney v. Erving, 228 U. S. 233, at 240 (*supra*).

The case is a simple one and presents no new or novel questions to be decided by this court, does not involve any conflict between decisions of this Court or the Circuit Courts nor does it involve any question of public importance and falls into the category of cases which this court has long since refused to review.

II.

Petitioner's Statement of Facts Is Inadequate and Inaccurate.

Petitioner has set forth what is entitled a "Summary Statement". A few of the many inaccuracies will be pointed out, together with additional material which was before the trial court and of which no mention is made by petitioner.

It is asserted that the trial court ruled that *res ipsa loquitur* did not apply in admiralty. (Pet. p. 5.) This

statement is inaccurate. The actual remarks of the court in no manner suggested the degree of finality urged by petitioner.[1] Nor is there anything in the record to indicate in the court's mind any distinction between the application of *res ipsa loquitur* in admiralty as opposed to common law courts.

Not only did the trial court indicate at the outset that the question of the applicability of *res ipsa loquitur* was still open for consideration at a later date, but petitioner's counsel fully argued *res ipsa loquitur* in both his arguments to the court. See particularly the closing argument, pages 882-888, wherein counsel cited a New York case relating to the application of the doctrine (p. 888) and handed the volume to the court (p. 919). The record reveals that at the time of the submission of the case the court retained the volume of the New York Reports which counsel had handed to him.

It was conceded by respondents that they did not know the cause of the fatal crash. It must be obvious that with a crash occurring approximately 340 miles east of Wake Island, with no survivors, and no eye witnesses, it would have been virtually impossible for respondent Transocean Airlines, Inc. to have submitted any evidence as to the actual cause of the crash. Petitioner's statement that respondents offered no evidence to "show proper care in all respects required of them" is inaccurate. A mass of evi-

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[1] The court stated as follows:

"The Court: I said that if I ruled on that, it would shorten the case, and I said I felt it didn't apply, so we will proceed with the trial.

Mr. Blackman: Is the question of the applicability of res ipsa loquitur *still open for consideration at a later date?*

The Court: Yes, certainly.

Mr. Blackman: I see" [p. 90].

dence was offered to show proper operation and maintenance, plus the presumption of due care on the part of the deceased pilots and crew.

Respondent Transocean Airlines, Inc. conducted a large operation, with principal bases in Oakland and Burbank, California, and with bases in Honolulu, Guam and Wake Island, as well as Tokyo and other points in the Orient.

In July, 1953, the month of the fateful crash, Transocean maintained facilities at Oakland, where they had 10 electricians, including 4 instrument men, as well as numerous mechanics [pp. 208-209]. They were equipped to make complete changes, work on automatic pilots and to do any other necessary maintenance work.

Facilities at Burbank were maintained by respondent Slick, the latter company being paid $33,000.00 a month for maintaining the airplane in question [p. 45]. Slick's facilities had been thoroughly investigated and found adequate. Their library contained all the necessary manuals relating to the maintenance of the aircraft [p. 764].

Transocean maintained in addition, bases at Honolulu, where the personnel was approximately 25 persons, at Wake Island, where the personnel was 75 to 80 persons, and at Guam, where the personnel was 15 to 20 persons; in each instance mechanics and other qualified persons being a part of the personnel capable of making engine changes, tire changes, replacing or working on the automatic pilot, and any other portion of the airplane [p. 726].

The aircraft was a Douglas DC-6 purchased from Slick, which was converted by Douglas from a cargo plane to a passenger plane. It was a type of plane customarily used throughout the world for the carriage of passengers and freight.

As a part of normal operating procedure in both Service and commercial flying, it is customary for the pilots to indicate in the ship's log any discrepancies that need correcting. These are termed in the industry, "squawks." *Everything* is put down, whether it is a broken light bulb or something really serious [p. 683].

Petitioners evidence showed a history of squawks relating to the automatic pilot. The evidence is undisputed however that on June 2, 1953, the automatic pilot was removed from the plane at Oakland by witness Babb and *completely overhauled*. Prior to October of 1953 the Civil Aeronautics Authority had not issued a repairman's certificate. As soon as they came out, however, in October, this man received such a certificate. Babb was amply qualified. He had been working on automatic pilots of the same type as were installed in the aircraft in question, since 1947 [p. 202].

He had received training in a trade school, at the Iowa State College for the Navy, had attended the gyro compass school for the Navy, the DC-6 school and the Slick Airways School [p. 197], in addition to a Navy instructor's school. He had schooling from a Bendix representative on the auto pilot [p. 198]. On June 2, this witness worked on the auto pilot and overhauled the altitude control unit [p. 239]. He discovered that the autyson rotor bearings were frozen. These bearings were replaced and the system checked and found to be satisfactory. The unit was reinstalled in the airplane and checked in the plane [p. 240]. This particular autyson was standard and was used in many similar instruments and the witness was thoroughly familiar with its overhauling [p. 242]. He tested the altitude control as prescribed in the overhaul manual [p. 242] and subjected it to various tests.

He tested the altitude control in the airplane and it worked satisfactorily. He was of the opinion that if there was any other component that was not working, it would have shown up in the operation of the auto-pilot [p. 250]. He checked out the overpowering mechanism and determined that the auto-pilot could be manually overpowered without excessive pressure, and that it did not overpower too easily; in other words, that there was sufficient control [p. 278]. This work was likewise checked out by witness George Shaw, an inspector with Transocean, who had a background of training at Cal Aero Tech and the Navy [p. 322]. It was the witness' opinion that the overhaul which had been done by Babb had corrected any trouble in the instrument [p. 335]. He observed the mechanic put the system through its ground run [p. 338]. *There is no record of any further squawk by any of the pilots with reference to the auto-pilot following the overhaul of June 2.*

During the month of July 1953, the airplane was flown on July 2nd from Oakland to Burbank, on July 4 from Burbank to Oakland, and then to Honolulu. On July 5 from Honolulu to Wake Island, and then to Tokyo, with a return trip to Wake Island on July 6. On July 6 the plane was flown to Honolulu and then to Oakland, where it arrived on the 7th, after which it was flown to Burbank. On July 8, the plane was flown from Burbank to Oakland and then on July 9 to Honolulu, where on the same day it returned to Burbank. On July 10, the plane was flown from Burbank to Oakland, from Oakland to Honolulu, and on July 11 to Guam and then on July 12 to Wake Island, where, en route to Honolulu, the plane disappeared.

It is significant to note that during the entire month of July, although there were minor squawks of various

type with reference to the plane, which were corrected, not one single mention appears of any malfunctioning of the auto-pilot or any of its component parts.

Captain Keating flew the plane during the fore-part of July and had used the automatic pilot and had experienced no difficulty with it [p. 728]. Captain Buckelew, an experienced flier, flew the plane on July 10, 1953, from Oakland to Honolulu, a flight of 10 hours and 5 minutes [p. 675]. He did not recall any difficulty in connection with the operation of the plane on that trip [p. 677]. Buckelew testified that if there had been anything unairworthy about the craft he would have so stated to Captain Word [p. 685]. There is no evidence to indicate that any of the pilots on the trip from Oakland to Honolulu, from Honolulu to Guam or from Guam to Wake Island, had any problem whatsoever with the automatic pilot. From this evidence alone, the trial court could reasonably conclude that Babb's overhaul had eliminated any problem with the automatic pilot.

The evidence is uncontradicted that on July 10, 1953, the plane departed from Oakland Airport for Honolulu, the flight being designated as No. 109. This flight was in charge of Captain Buckelew, an experienced pilot and a good friend of Captain Word, the pilot on the fatal flight. Captain Buckelew flew the plane to Honolulu, where it was taken over by Captain Wm. L. Word, First Officer Herbert A. Hudson, Second Officer Leonard H. Nowell, Navigator John Hoy, Flight Engineer George Haaskamp, Student Flight Engineer Paul Yedwabnick, a flight purser and a stewardess. All these persons were well known to Captain Buckelew [pp. 670-672]. In the opinion of the witness, Captain Word and the members of the crew appeared to be fresh. In his opinion at the time the air-

craft was turned over to Word, it was in an airworthy condition [p. 685]. This was the crew on duty at the time of the fatal flight.

The evidence was uncontradicted that all three of the pilots were experienced pilots. While the total flying time of none of these men is reflected in the record, it is obvious that even in DC-6 equipment alone, their flying experience had been considerable. Thus, Captain Word had DC-6 flight time of 712 hours; Officer Hudson had 529 hours in DC-6 equipment, and Officer Nowell had 699 hours in DC-6 equipment.

Captain Word was described by one witness as being a very good pilot—conservative, knew his business [p. 677]. Captain Keating testified that Word and Hudson were excellent pilots [p. 732]; that Officer Nowell was a good pilot [p. 736]; that Flight Engineer Haaskamp was an excellent flight engineer. He was described as being above average.

The flight from Honolulu to Guam was uneventful. Don Carson, the dispatcher at Guam on July 11, actually observed the plane land [p. 629]. The passengers were helped off the aircraft and the witness talked to the crew [p. 632]. The flight logs and the weather were discussed with the members of the crew. No complaints of any kind were made with reference to the functioning of the aircraft.

The crew was in good spirits and none appeared to be ill [p. 634], and none appeared to be suffering from pilot fatigue [p. 634]. The crew was taken in two vehicles to the Transocean headquarters in the mountains. They were fed and after a brief "bull session" the crew broke up and went to bed. The following morning the crew

was awakened and driven to the airport. Everyone looked normal and rested and nobody appeared tired [p. 640]. The crew went to the office and the witness was in contact with all members of the crew and observed their physical condition during a period of approximately an hour and a half before the flight. He noticed nothing unusual about their physical condition [p. 641]. He was a very good friend of all members of the crew. The plane was put through a pre-flight check and sounded satisfactory. He observed the take-off and noticed nothing unusual about the take-off or the attitude of the plane [p. 646].

A short time later the plane landed at Wake Island.

Harry Wood, a mechanic employed by Transocean at Wake Island, and whose duty it was to service and maintain the aircraft, observed the plane land at Wake Island [p. 699]. He checked immediately with the flight engineer and Captain Word and there were no complaints with reference to the plane [p. 702]. He went over the matter of possible discrepancies with the flight engineer, Haaskamp, and was advised that there was no malfunctioning or discrepancies in the aircraft. In checking the log, Wood did not observe any squawks or complaints other than the left main inboard tire, which showed some signs of wear [pp. 705-706]. The evidence was uncontradicted that a worn tire would have no bearing of any type upon the airworthiness of the plane [p. 705]. The ground checks made of the plane before its departure were satisfactory [p. 709]. He fully and completely checked the airplane before departure [pp. 703-704].

While much of petitioner's evidence was devoted to a long excursion into the voluminous records relating to the particular plane; going back for a period of days,

weeks, months and even years before the accident in question, the fact remains that the plane was constantly serviced by both Slick and Transocean and that the arrival at Guam was *uneventful* as well as the departure from Guam and the arrival at Wake Island. At the time of the departure from Wake Island, the crew appeared to be in good spirits. There is no evidence of any problem on the flight between Guam and Wake Island, nor is there any evidence of any problem developing after the take off at Wake Island, during which time position reports were given on two occasions.

At Wake Island, several of the ground crew were deeply conscious of the departure of this particular plane since it contained at least a dozen members of families departing from the Island, with whom they were thoroughly familiar, as well as the crew, who were good friends of the witnesses that testified. It is fair to infer that none of the ground crew, faced with the obligation of correcting any known flaws in the plane, would have permitted this particular plane under these circumstances to have departed without taking every possible precaution.

The crew in question boarded the airplane in Honolulu and flew to Guam where they were taken from the air field in two automobiles to quarters where they were appropriately fed. The uncontradicted evidence is that they had ample rest and opportunity for rest and that the following morning, the day of the fateful flight, they had breakfast, and that at that time they appeared to be rested and there was no evidence of any fatigue [p. 638]. This testimony came from persons who were experienced in the observation of pilots and persons engaged in the flying of aircraft and who would clearly be in a posi-

tion to know about fatigue and the effects of fatigue on an individual.

Some of the evidence relating to the auto-pilot has already been referred to. There is no evidence indicating that in fact the auto-pilot was in use at the time of the disappearance of the plane. Its use is *optional* with the pilot, who may or may not see fit to use the instrumentality. In any event, the plane had been flown from Honolulu to Guam to Wake Island with no evidence of any problem in connection with the auto-pilot. At the time of the last radio check in, there was no mention of any difficulty with the auto-pilot. Respondent's employees are of course entitled to the presumption that they take ordinary care for their own concerns and that they obey the law, and it must therefore be presumed that if there had been any difficulty with the auto-pilot as a result of the long flight from Honolulu to Guam, or from Guam to Wake Island, the crew would have called attention of this fact to the ground crew at either Guam or Wake Island, so that the needed repairs could be made. There is no evidence of any such request.

It is quite obvious that at the time of the last report, the plane had just reached its cruising altitude. What the pilot did with reference to the auto-pilot at that point is of course pure speculation. The evidence is uncontradicted in any event that there are at least four methods by which the pilot or co-pilot may disengage the auto-pilot. See testimony of Buckelew [p. 680]; testimony of Keating [pp. 729-730]. Babb testified that there were four ways in which the auto-pilot could be disengaged [p. 287]. There is a switch on the pedestal, a disengaging switch on the pilot's control wheel, a disengaging switch

on the co-pilot's control wheel, and the manual disengaging of the servos by the pilot's left hand [p. 289].

If the pilot controls the plane with the auto-pilot disengaged, no malfunctioning of the auto-pilot could in any way effect the operation of the plane [p. 290]. The pilot can overpower the auto-pilot *at any time* by merely grabbing the controls, which are checked every time the auto-pilot is checked [p. 291]. Babb testified that he had never heard of a pilot's disconnect buttons becoming inoperative [p. 293].

Tracy, the petitioner's expert witness, testified that if there was any malfunctioning of the auto-pilot [p. 268] there would in all reasonable probability be some indication of that fact to the pilot [pp. 268-269]. He testified that:

> "At any time there is any indication of any whatsoever malfunctioning about the auto gyro it *can be taken over and handled manually by the pilot or the co-pilot.*" [p. 271, lines 12-15].

Petitioner asserted that there should have been more than one bunk on this aircraft. His own witness, Tracy, admitted that with three pilots the usual practice would be for one member to rest and the other two pilots to operate the plane [p. 274, lines 6-15]. The evidence is undisputed that there was such a bunk for the pilot.

It is also asserted that it would have been good practice to change crews at Wake Island (Op. Br. p. 10). The evidence from Captain Keating was that where there was a *two* pilot crew, the crew would be changed at

Wake Island, but that if it were a multiple crew, they would not change. The answer is obvious. With a multiple crew, the pilots can rotate a rest period in the bunk provided for that purpose [p. 756].

While the foregoing does not of course constitute all of the evidence in the voluminous record, it is sufficient to demonstrate that there was a substantial conflict, and the trial court, having heard the witnesses and the conflicts and the conflicting inferences they might reasonably have drawn therefrom, concluded that the petitioner had failed in his ultimate burden of establishing negligence.

III.

The Writ of Certiorari Should Be Refused Because the Case Does Not Involve Any Question of Public Importance.

Petitioner is again attempting to seek a review of conflicting evidence by this court. In the face of the substantial evidence in favor of the trial court's findings, it would be contrary to the long declared policy of this court to review such a conflict.

N.L.R.B. v. Pittsburgh Steamship Co. (1951), 340 U. S. 498, 95 L. Ed. 479, 482, 483;

General Talking Pictures Corp. v. Western Electric Co. (1937), 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849;

United States v. Johnson (1925), 268 U. S. 222, 227, 69 L. Ed. 925, 926.

IV.

The Opinion of the Court of Appeals Is in Full Accord With Established Law Laid Down by This Court.

A. The Decision of the Court of Appeals Does Not Conflict With Other Decisions of Said Court.

Reliance is placed upon the case of *Desmarias, et al. v. Beckman,* 198 Fed. 2d 550. That case in no manner conflicts with the opinion of the court in this case. The case arose as a result of a motion to dismiss, it being *stipulated* by counsel that *if the motion was denied, judgment might be entered as prayed.*[2]

The Ninth Circuit Court of Appeals merely held in the *Desmarias* case that under the circumstances, *res ipsa loquitur* was applicable, just as the same court held in the present case. *No problem was presented as to the procedural effect of the doctrine* since defendant in that case offered no evidence and apparently was content to rely merely upon the motion to dismiss. The Court of Appeals held that the doctrine was applicable, and in keeping with *Sweeney v. Erving,* 228 U. S. 233, and other cases, that where the doctrine is applicable, it presents evidence which the trial court may consider, in the absence of contrary evidence such as was presented in the case at bar. The trial court, in that case, concluded that the inference afforded by the doctrine was sufficient. The case therefore is not in point and is clearly distinguishable.

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[2]The case of *Desmarias v. Beckman* was actually not an admiralty case, but was commenced under the Alaska Territorial Wrongful Death Act, which provided that in an action for damages for wrongful death, the recovery should not exceed $15,000.00, together with reasonable attorney's fees. (Sec. 61-7-3 of the Alaskan Compiled Laws, Annotated.) Apparently counsel in that case was willing to stipulate that if the court denied the motion to dismiss, judgment could be entered for $15,000.00 damages, plus $3,000.00 attorney's fees.

The case in no manner conflicts with the other cases set forth on page 14 of the Petition. In the case of *Bergen v. United States*, 222 F. 2d 949, a passenger apparently attempted to *prove* the cause of the derailment which caused his injuries. There is nothing in the opinion to indicate that the plaintiff even attempted to rely on the doctrine of *res ipsa loquitur*. The Court of Appeals merely held that the doctrine was applicable and sent the case back for further proceedings. No evidence had been offered by the defendant as in the case at bar.

The cases of *Smith v. Pacific Alaska Airways*, 89 F. 2d 253, and *Pacific Alaska Airways v. Mahan*, 89 F. 2d 255, are likewise not in conflict with the case at bar. In the case of *Smith v. Pacific Alaska Airways*, 89 F. 2d 253, at 254, the Circuit Court in referring to the doctrine of *res ipsa loquitur*, states:

> "It is proper for us to say that a full discussion of the applicable rule appears in *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, cited in Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 57 L. Ed. 815."

B. The Decision of the Court of Appeals Is Not in Conflict With the Decisions of This Court and Is in Full Accord with the Cases of Sweeney v. Erving, 228 U. S. 233; C. & O. Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416, and Innumerable Decisions of the Various Courts of Appeal.

The chief complaint made by petitioner is that the opinion of the Court of Appeals is in conflict with prior decisions of this court in *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, and that the case of *Sweeney v. Erving*, 228 U. S. 233, decided long after the earlier cases relied upon by petitioner, is not in point.

It is suggested that insofar as the application of the doctrine of *res ipsa loquitur* is concerned, a different principle applies in carrier cases and non-carrier cases.

This court in the *Sweeney* case, *supra*, has not suggested such a distinction and as Dean William L. Prosser pointed out in a very illuminating article on the procedural effect of *res ipsa loquitur* (20 Minn. Law Review, p. 241), although some of the earlier cases apparently made a distinction between carrier and non-carrier cases, *such distinction no longer exists.*[3]

The cases of *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, *New Jersey R. & T. Co. v. Pollard*, 22 L. Ed. 877, *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, and *Patton v. Texas & P.R.R. Co.*, 179 U. S. 658, were all decided before *Sweeney v. Erving*, 228 U. S. 233.

This court in *Jesionowski v. Boston & Maine R.R.*, 329 U. S. 452, 91 L. Ed. 416; 67 S. Ct. 401, referred to the *Sweeney* opinion at page 457 as the "decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur.*"

It is interesting to note that this court in the Sweeney decision specifically refers to each and every one of the cases relied upon by petitioner, and this court stated that even in a carrier-passenger case, where there was a high degree of care owing to the passenger, that this court "did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue."

Sweeney v. Erving, 228 U. S. 233, at 240.

This landmark decision which has been followed consistently by the various Circuit Courts and by countless

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[3]See Appendix.

state court decisions, set down the rule relating to the procedural effect of *res ipsa loquitur* in the following language:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions." [p. 240].

It is interesting to note that immediately following the foregoing language, this court refers to several *carrier* cases in support of the proposition that the rule of *res ipsa loquitur* does not relieve the plaintiff of the ultimate burden of establishing negligence and *that it is upon the whole case*, a question of fact for the trial court or jury to determine whether or not the plaintiff has made out his case.

This court in the case of *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270; 11 S. Ct. 653, held that the plaintiff was entitled to an instruction that the defendant's conduct was, *prima facie* evidence of

negligence. This Court, however, pointed out at page 554 that the jury was properly instructed:

> "The Court did not in this or any other instruction tell the jury that the burden of proof on the issue of defendant's negligence was shifted upon the defendant. On the contrary, the jury were afterwards expressly instructed plaintiff's whole ground of recovery is that the defendant was negligent. The burden of proof is on the plaintiff to sustain this allegation."

It has been said that if the defendant offers an explanation, it is for the jury to weigh that explanation in relation to all of the evidence, but the burden of proof remains on plaintiff and is not on the defendant by its explanation to satisfy the jury that it was not negligent. With the explanation in, the burden of proof is still entirely with the plaintiff to satisfy the jury on the whole case, including the explanation, that the defendant was negligent.

See *Griffin v. N. Y. Central R. Co.*, 98 N. Y. S. 2d 346, at 349; 277. App. Div. 323; *Lobel v. American Air Lines*, 192 F. 2d 217.

Probably one of the best statements of the rule is to be found in *N. Y. and St. Louis R. Co. v. Henderson*, 146 N. E. 2d 531 (Ohio) at page 537, where the court states:

> "Under the true rule of *res ipsa loquitur*, the inference of negligence which is drawn from the facts is placed on the scales to be weighed with any and all explanations offered by the defendant. The infer-

ence of negligence, or, as sometimes stated, the 'presumption', does not vanish when the defendant comes forward with an explanation, but on the contrary stays in the case to be considered with all other evidence by the trier of fact. The *weight* to be given this inference and its relationship to all the other evidence is solely for those determining the facts."

In *Martin v. United States*, 225 F. 2d 945 at 948, the court says, citing *Sweeney* (*supra*):

> "*Res ipsa* simply means that there arises from the circumstances of the accident an inference of negligence, which is not a presumption but a mere mechanical device that requires the trier of fact—whether judge or jury—to consider the evidence to see whether its preponderance shows the defendants negligence. The inference, *even standing alone, may be rejected by the trier of fact.*" (Emphasis added.)

In the *Martin* case the trial court expressly found as a part of the findings that the doctrine did *not* apply. The circuit court held that any error in this regard would be *immaterial* [p. 949].

Other carrier cases following the rule of the *Sweeney* case are too numerous to set forth. Some of them are as follows:

Robertson v. Washington Ry. & Elect. Co., 279 Fed. 180, at 184;

Underwood v. Capital Transit Co., 183 F. 2d 824;

Capital Transit Co. v. Jackson, 149 Fed. 439.

V.

Petitioner Is Inaccurate When He Suggests That the Court of Appeals Held as a Matter of Law That an Inference of Negligence Was Insufficient to Support a Judgment in Favor of Petitioner.

The fallacy of this point, as well as the other points which are presented in the petition, is that petitioner overlooked the fact that he is dealing with findings of fact and conclusions of law made upon conflicting evidence. There is no suggestion by the Court of Appeals that if the only evidence in the case had been the inference created by the doctrine of *res ipsa loquitur* and there had been a judgment in favor of the plaintiff, that this evidence would not have been sufficient to support such judgment. Petitioner again confounds the issue by assuming that the court was compelled to draw the inference of *res ipsa loquitur*. This court in *Sweeney v. Erving*, 228 U. S. 233, *supra*, stated that *res ipsa loquitur* merely means that the facts of the occurrence "warrant the inference of negligence, *not that they compel such an inference.*" [p. 240].

Petitioner repeats the assertion that there was no evidence tending to show that respondent acted with the utmost prudence on the occasion in question. This of course is contrary to the record and the evidence which has been heretofore set forth, which clearly created a question of fact for the trial court.

The case of *Matsumoto v. Chicago and N.W. Ry. Co.*, 168 F. 2d 496 (Pet. p. 21), is in full accord. There a judgment in favor of the plaintiff was affirmed. The key to the decision is found at page 500, where the court says, "Upon a consideration of the facts, we cannot say *as a matter of law* that the defendant has rebutted a presumption of negligence on its part." In other words, the

Appellate Court was unwilling to disturb the factual finding of the trial court and concluded that the inference or presumption of negligence was sufficient where the trial court had made a finding in accordance with the presumption. Likewise, in *Chicago and N. W. Ry. Co.*, 168 F 2d 496 (Pet. p. 21), the court points out,—

> "As previously noted, the question of whether the defendant offered a satisfactory explanation of the cause of plaintiff's injuries so as to lift its presumption of negligence is properly a question of fact for the jury."

The case of *Austerberg v. United States*, 109 F. 2d 583 (Pet. p. 21), is in full accord with the rule of law as laid down by this court in the *Sweeney* case. See particularly the Court of Appeals decision at page 591.

VI.

The Court of Appeals Committed No Error in Refusing to Reverse the Judgment, Since There Was Ample Evidence to Support the Trial Court's Findings. There Was No Requirement That the Trial Court Make a Separate Finding as to the Applicability of Res Ipsa Loquitur.

It is suggested in Point IV that the District Court refused to make a finding as to whether or not it had applied *res ipsa loquitur*. Full and complete findings were made on all issues raised by the pleadings. *Res ipsa loquitur* is a rule of *evidence*, and no useful purpose would have been served by making a finding that the court had applied or rejected *res ipsa loquitur*. The doctrine affords merely evidence which, either alone or along with other evidence, may establish negligence. The court's finding was simply to the effect that there was no negligence.

Again, petitioner takes the position that the doctrine establishes an absolute right to a judgment in his favor. This is not the law and has never been the law.

There is nothing in Rule 52b of the Federal Rules of Civil Procedure which is violative of this principle. The basis of the trial court's decision was founded in the evidence which has been heretofore set forth, indicating that in its opinion, plaintiffs, from a consideration of the whole of it, had failed to establish negligence in any respect or in any of the respects suggested by petitioners.

It is suggested that no evidence tending to establish due care in all possible respects was offered. Petitioner completely overlooks the presumption of due care to which the respondent's employees were entitled. This evidence in and of itself, just as the inference of *res ipsa loquitur*, was evidence which the trial court could consider in concluding that the pilot employees of the respondent were not negligent at or about the time of the fatal crash. Ample evidence was offered as to the condition of the plane, the condition of the crew, the inspection and servicing of the airplane, all of which would relate to the accident and which would bear upon the question of whether or not the respondent was guilty of negligence in or about the operation or maintenance of the aircraft. *Non-negligent air crashes are common* arising from a variety of causes. The trial court, upon conflicting evidence was justified in concluding that the cause of the crash, although not established was non-negligent.

Of particular significance is the case of *Danner v. Atkins*, 47 Cal. 2d 327, where a judgment in favor of the defendant was affirmed. The Supreme Court of California held that the doctrine of *res ipsa loquitur* was properly applied. The defendants were unable to explain the

cause of the accident, which involved a truck which had been parked by the defendant's employee on a slope and which subsequently left the place where it had been parked and injured the plaintiff. The only evidence presented by the defendant was an explanation of his conduct, *i.e.*, what he had done at the time he had parked the truck. The court stated at page 332:

> "Thus, even though we assume that the court could have concluded here, . . . that the cause of the accident remained unexplained, nevertheless the testimony of both Atkins and the mechanic McElyea provided direct evidence that Atkins had used due care in his handling of the truck, evidence which if believed by the trier of fact, is sufficient to rebut the inference of negligence raised by the *res ipsa loquitur* doctrine."

With respect to the basic application of the doctrine, the court states at page 332:

> "If, however, the trial court did conclude that facts existed which gave rise to the *res ipsa* inference, nevertheless, as commanded in *Druzanick v. Criley*, 19 Cal. 2d 439, 444, that doctrine, even where applicable, does not give a plaintiff an *absolute* right to a judgment in every case, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a *question of fact whether the inference has the greater weight, or is evenly balanced, or has been dispelled or overcome.*"

Conclusion.

The only purpose of the petition is to review the sufficiency of conflicting evidence and conflicting inferences that may be drawn from the evidence presented to the trial court. No question of public interest and importance is presented, and the case is in full accord with not only the decisions of the Ninth Circuit court, but with decisions from other Circuits, as well as with the decisions of this Honorable Court. The petition for writ of certiorari should not be granted.

Respectfully submitted,

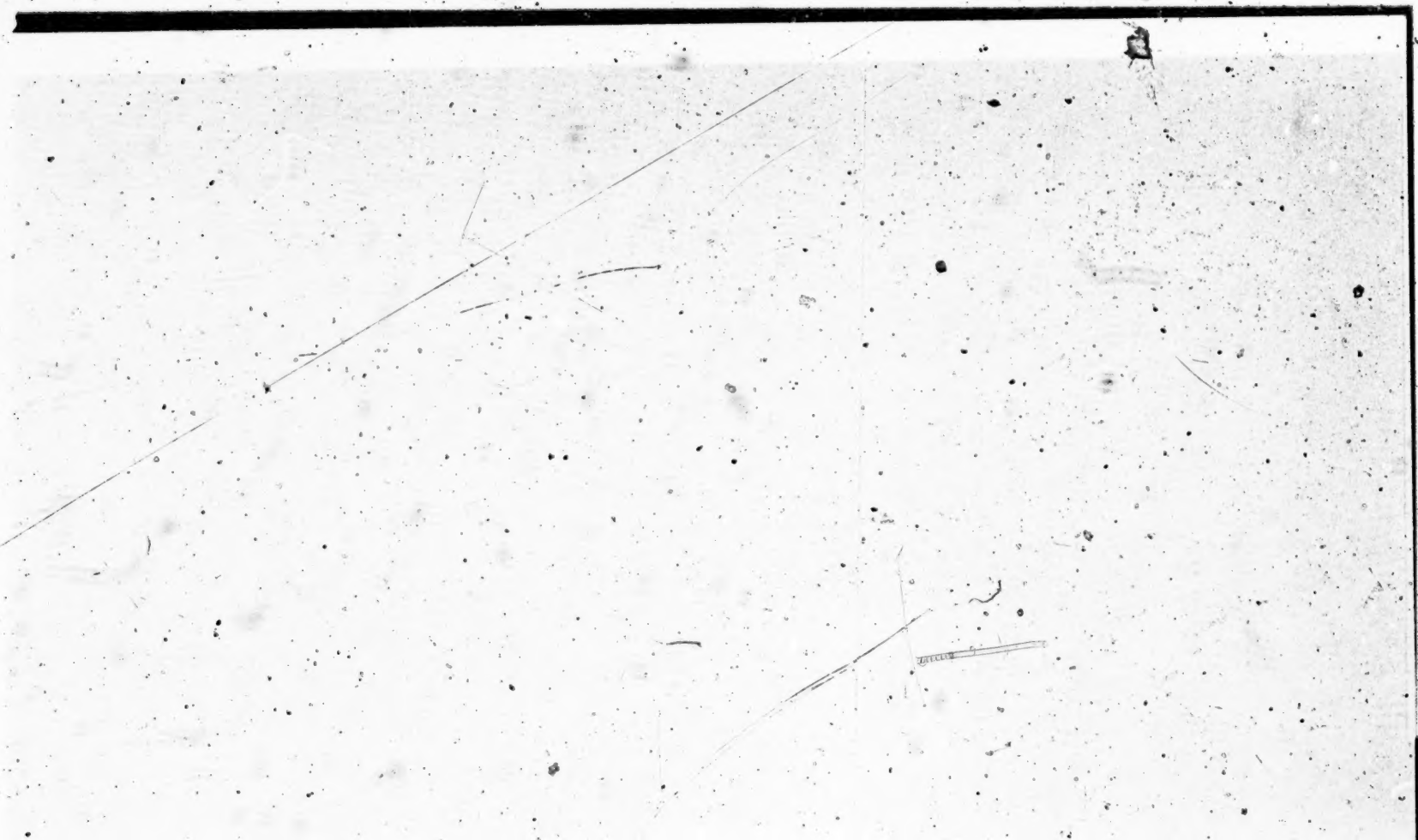
JOE CRIDER, JR.,

Attorney for Respondent.

Associate Counsel Not Members of This Court:

ELBER TIESON,

HENRY E. KAPPLER.



APPENDIX.

PROSSER: PROCEDURAL EFFECT OF RES IPSA LOQUITUR.
(20 Minn. Law. Rev., pp. 260, 261.)

In the simplest res ipsa loquitur case, there is only a permissble inference of negligence. It is significant that many of the jurisdictions which give the doctrine greater effect have been compelled to recognize, under other names, the existence of a type of res ipsa case where there is no more than an inference. The source of the presumption idea is not difficult to trace. It rests largely upon the feeling that all the evidence must be in the possession of defendant, and he should be called upon to explain, under penalty of a decision against him. But it never has been a sufficient defense in a res ipsa case that the defendant has no evidence, and knows no more about the cause of the accident than the plaintiff; and *there is no policy of the law in favor of permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary. Galbraith v. Busch* (1935), 267 N. Y. 230, 196 N. E. 36. Another explanation lies in the fact that many of the early cases were actions by passengers against carriers, and, by analogy to the cases of damage to goods, it was considered that plaintiff had established his case by proving breach of the contract of safe transportation, and defendant thereafter had the affirmative of the issue as to his own due care. *This point of view has merged and become lost in the general 'doctrine' of res ipsa loquitur;* and carrier cases now are treated like others[1] but it has left its mark in many states. (Emphasis added.)

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[1]Dobie, Bailments and Carriers, sec. 188, p. 608; 4 Elliott, Railroads, Sec. 1644, p. 573; 3 Moore, Carriers, 2d Ed., p. 1477; 3 Hutchinson, Carriers, 3d Ed., Secs. 1413, 1414, pp. 1700 ff. But

If the thing speaks for itself, if the inference is sufficiently strong to induce the court to say that it may be drawn, why permit a perverse jury to *refuse* to draw it? If the obvious conclusion from the circumstances is that defendant has been negligent, why not direct a verdict for the plaintiff?

The answer is, that in the usual res ipsa case the inference of negligence is not exclusive, nor is it so strong that we may say as a matter of law that the jury could not reject it. *If the defendant's elevator falls while the plaintiff is riding in it, it may be inferred that there has been negligent construction, failure to inspect, negligent operation. But it may also be inferred that there was a defective cable which could not have been discovered by all reasonable care, or that some unavoidable accident has happened to the machinery. Whether one inference is more reasonable than the other is a question which cannot be determined as a matter of law, and must be left to the jury.*[2]

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see *Gordon v. Huehling Packing Co.* (1931), 328 Mo. 123, 40 S. W. 2d 693; *Hartnett v. May Dept. Stores* (Mo. App. 1935), 85 S. W. 2d 644, to the effect that carrier cases involve a presumption, other *res ipsa* cases a mere inference. *Sweeney v. Erving*, 228 U. S. 233; *Central R. R. of N. J. v. Peluso*, 286 Fed. 661 (C. C. A. 28); *Atlas Powder Co. v. Benson*, 287 Fed. 797 (3rd C. C. A.); *Dierks Lbr. Co. v. Brown*, 19 Fed. 2d 732 (8th C. C. A.); *Cochran v. P. Hasburgh & L. E. R. R. Co.*, 31 F. 2d 769; *Blantor v. Great Atl. and Pac. Tea Co.* (C. C. A. 5).

[2] . . . but that inference is still one for the jury and not for the court. They may not believe the witnesses; *the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do;* they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant." *Swayze, J., in Hughes v. Atlantic City & S. R. R.* (1914), 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927.